No. 88-562

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

TERRY LEWIS COLE - - - - Petitioner

versus

H. GARY WELLS - - - - - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

I. **Did The Court Below Err In Holding That the State of Michigan Was Not Bound To Apply Its Existing Case Law to Petitioner's Direct Appeal?**

II. **Was the Nondisclosure by the Prosecution of Monetary Rewards Paid to State's Witnesses, Who Gave Material Testimony, a Denial of Petitioner's Rights Secured by the Due Process Clause of the Fourteenth Amendment?**

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LIST OF PARTIES

The following is a list of all parties involved in this proceeding and their respective counsel:

State of Michigan

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

No.

TERRY LEWIS COLE - - - - - *Petitioner*

v.

H. GARY WELLS - - - - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINION BELOW

The Order affirming Petitioner's conviction entered by the United States Court of Appeals for the Sixth Circuit may be found in Appendix A. A Transcription of the Bench Disposition by the United States Court of Appeals for the Sixth Circuit may be found in Appendix B.

JURISDICTION

The disposition of Petitioner's appeal below, entered by the Sixth Circuit Court of Appeals pursuant to 6th Cir. Rule 19, was announced on May 29, 1988, following oral argument. The final Order itself, entered by the Clerk in accordance with the decision of the panel from the bench, was entered on May 20, 1988. This Petition for Writ of Certiorari was filed within

60 days of that date. Jurisdiction is invoked under the authority of Title 28, United States Code, Section 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution, which states in pertinent part:

> "No person shall be held to answer for a capital, or otherwise infamous crime . . . nor be deprived of life, liberty or property, without due process of law . . ."

The Sixth Amendment to the United States Constitution, which states in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor . . ."

The Fourteenth Amendment to the United States Constitution, which states in pertinent part:

> ". . . nor shall any State deprive any person of life, liberty or property without due process of law . . ."

STATEMENT OF THE CASE

On November 14, 1974, following a Michigan jury trial, Petitioner was convicted of First Degree Felony Murder. Life imprisonment, without the possibility of parole, resulted.

The crime involved the killing of a drug store owner during the course of a robbery attempt.

At trial, the prosecutor relied heavily upon the testimony of two women who had previously lived with Petitioner and his co-defendant. Some time after the trial, Petitioner discovered that these witnesses had been given monetary awards for having testified against him.

One of the central issues at trial was whether or not Petitioner, in shooting and causing the victim's death, had acted with an intent to murder. A good deal of testimonial evidence was adduced which bore upon Petitioner's lack of intent to murder. For example, one witness stated, "Terry [Petitioner] said he was going to rob the man. It was for robbery, and that was it." Another witness testified that the Petitioner had told him, ". . . [W]e didn't mean to shoot him." In his closing argument to the jury, the prosecutor himself acknowledged to the jury that, "[h]e surely didn't want to kill [the victim]." The prosecutor further admitted to the jury that, ". . . we do not have any substantiation that he [Petitioner] is a cold blooded murderer."

Despite this evidence bearing upon Petitioner's lack of malice, and despite supporting case law which existed in Michigan at the time of Petitioner's trial, the trial court refused to instruct the jury on the lesser included offense of either Second Degree Murder or Manslaughter.

Upon a direct appeal of Petitioner's conviction, the Michigan Court of Appeals remanded for an evidentiary hearing regarding the receipt of money by the

prosecution's witnesses. Following the hearing, which resulted in no relief to Petitioner, the Michigan Court of Appeals affirmed on the issue relating to the payments to the witnesses but, because of an instructional error concerning the element of intent, reversed the case and remanded for entry of judgment on the lesser included offense of Manslaughter. *People* v. *Dietrich*, Mich. App., 274 N.W. 2d 472 (1978).

The Michigan Supreme Court, however, reinstated Petitioner's original Felony Murder conviction. *People* v. *Dietrich,* Mich., 315 N. W. 2d 123 (1982).

Next, Petitioner filed a Petition for Writ of Habeas Corpus in the Federal District Court. Denying relief, that court held *inter alia* that the offer of a reward is not the type of exculpatory evidence contemplated by *Brady* and its progeny and, further, that since there was no evidence of a lesser degree of felony murder, failure to instruct on a lesser included offense did not prejudice Petitioner's Constitutional rights. The United States Court of Appeals for the Sixth Circuit affirmed the District Court's Order dismissing Petitioner's Petition for Writ for Habeas Corpus.

This instant action followed.

REASONS FOR GRANTING THE WRIT

I.

The state of the law in Michigan at the time of Petitioner's trial in 1974 clearly provided that if the evidence was subject to different interpretations that would justify a finding of a lesser offense, a charge as

to such lesser offense should be given. See *People* v. *Carter,* 197 N. W. 2d 57, 69 (1972). In the instant case there was ample evidence, as set forth in the statement of facts herein, that would have allowed a reasonable minded jury to conclude that Petitioner might have been guilty of Second Degree Murder or even of Manslaughter. Yet the trial court refused Petitioner's request for an instruction on a lesser included offense of Felony Murder.

To be sure, the jury might have found Petitioner guilty as charged, not because he was guilty and proven so, but because the jury was not given the opportunity to find him guilty of some lesser offense. Under these circumstances Petitioner was denied due process of law under the Fourteenth Amendment of the United States Constitution.

Federal Courts have jurisdiction to review the State Courts' refusal to instruct on a lesser offense if a failure to give the instruction deprives the defendant of due process. *Brewer* v. *Overberg,* 624 F. 2d 51, 52 (6th Cir. 1980); *Bishop* v. *Mazurkiewicz,* 634 F. 2d 724, 725 (3rd Cir. 1980).

The District Court erroneously concluded that there was no evidence to have warranted a lesser offense instruction. The United States Court of Appeals for the Sixth Circuit, in upholding the District Court, declined to intervene and require the State of Michigan to apply its own existing precedent to Petitioner's case. This Court should therefore grant this Writ of Certiorari to review the judgment below.

II.

The Court below, in affirming the District Court's decision in this case, held that the offer of a reward is not the type of exculpatory evidence contemplated by *Brady* and its progeny. However, this Court has recently held that undisclosed impeachment evidence, such as the "type" at issue here, is an error of constitutional magnitude if the evidence might have been helpful in cross-examination. *United States* v. *Bagley,* 473 U.S. 667, 87 L. Ed. 2d 421, 105 Sup Ct. 3375 (1985). See also *United States* v. *Presser,* 844 F. 2d 1275 (6th Cir. 1988).

Clearly, had Petitioner known at trial of the monetary awards that had been paid to the two material witnesses, he could have effectively impeached their testimony. Thus, there is a reasonable probability that the results of the trial would have been different. The reliability of these two witnesses may well have been determinitive of guilt or innocence.

As the foregoing discussion demonstrates, the prosecution's failure to disclose the fee arrangements to the witnesses to Petitioner unconstitutionally deprived him of a fair trial. The nondisclosure of this *Brady* material plainly undermines confidence in the result of Petitioner's trial. Accordingly, this Court should grant this Writ of Certiorari to review the judgment below.

CONCLUSION

Petitioner prays that a Writ of Certiorari issue to review the judgment below.

Respectfully submitted,

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APPENDIX

APPENDIX A

No. 87-1670

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

TERRY LEWIS COLE, - - - *Petitioner-Appellant*

v.

H. GARY WELLS, - - - - *Respondent-Appellee*

ORDER—Filed May 20, 1988

BEFORE: MERRITT and KENNEDY, Circuit Judges, PECK, Senior Circuit Judge.

This cause having come on to be heard upon the record, the briefs and the oral argument of the parties, and upon due consideration thereof,

The court finds that no prejudicial error intervened in the judgment and proceedings in the district court, and it is therefore ORDERED that said judgment be, and it hereby is affirmed upon the opinion of that court.

Entered By Order of The Court
John P. Hehman, Clerk
(s) John P. Hehman

APPENDIX B

Transcript of the Court Below's Disposition of this Case, Made in Open Court From the Bench Pursuant to 6th Cir. Rule 19

JUDGE MERRITT: Counsel, the Court is going to disclose and decide this case under Rule 19 of the Rules of the Court which provides that if the panel is unanimously of the view that a written opinion by one of the members of the panel is unnecessary to the disposition of the case that the Court may rule on the case from the bench. And, under that Rule the transcript of the Court's ruling as well as the oral argument in the case will be available from the Clerk's office, the arguments and the Court's remarks are available to counsel in case counsel wants to use them for any purposes or any other pleadings. Basically in this case, we think that the Judgment of the District Court should be affirmed for the reasons set out in the Magistrate's report to the District Court. The issues that you raised concerning retroactivity and manslaughter and a felony murder rule are issues of State law and would become Federal issues only to the extent that it could be said under *Windship, Windship* case and other cases that the State has established a particular element of the crime which was not proved. That's not really the basic argument here and we do not see that that is the case. So on that series of State Law issues which you are attempting to erect into Federal Law issues, and we understand why you are trying to do that but we don't agree that they raise any significant Federal Law issue. The only issue in the case which, it seems to me is a little troublesome, is the *Brady* issue and it was deal with by the Magistrate by saying essentially that the State trial court had found and that the Magistrate and the District Judge also found that

under the facts of this case regarding the reward that the information in question was not material within the meaning of materiality as the Supreme Court has defined it in a series of cases after *Brady,* and in *Brady* itself. For example, in *Brady,* quoting there, *Brady* says that "a majority of this Court has agreed"; no, excuse me, this is in the most recent Supreme Court case, *Pennsylvania* v. *Ritchie,* which is a 1987 case; "a majority of this Court has agreed evidence is material only if there is a reasonable probability that had the evidence been disclosed to the defense the result of the proceeding would have been different. A reasonable probability is a probility sufficient to undermine confidence in the outcome." Now here, it was a public matter to begin with. There is no reason to believe, based on this record, that this disclosure would have made any difference in the outcome, and the State Court has so found and the Magistrate and the District Court have agreed; if we were of the view that that was a mistake under Section 2254, Title 28, then we would be obligated to set that finding, to the extent that it is a finding of fact, aside, but the Court is not of the view that it could find that that finding is a mistake or that the ruling, the legal ruling on the basis of that finding is in error. And so for those reasons the Court will affirm the Judgment of the District Court. My colleagues may have something else to add to the . . . With that, the Judgment of the District Court will be affirmed.

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TERRY LEWIS COLE,

Petitioner,

v.

H. GARY WELLS,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I.

Did the trial court err in not giving instructions regarding crimes of manslaughter and second degree murder?

II.

Is Petitioner entitled to relief pursuant to Brady v Maryland, 373 US 83 (1963)?

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STATEMENT OF THE CASE

Petitioner was convicted of first degree felony murder on November 14, 1974, following a jury trial. Petitioner was subsequently sentenced to a term of life imprisonment.

On appeal, the Michigan Court of Appeals remanded for an evidentiary hearing regarding the receipt of awards by several of the prosecution witnesses. Following the hearing, the Michigan Court of Appeals concluded that there was no issue regarding payments to witnesses. The Court of Appeals concluded, however, that an instructional error by the trial court took the element of malice aforethought away from the jury. The Michigan Court of Appeals, therefore, reversed Petitioner's murder conviction and remanded the case for entry of

judgment on the lesser included offense of manslaughter. In People v Deitrich, 412 Mich 904; 315 NW2d 407 (1982), the Michigan Supreme Court reinstated Petitioner's murder conviction.

In October, 1984, Petitioner filed a Petition for Writ of Habeas Corpus with the United States District Court, Western District of Michigan, Southern Division. On March 22, 1987, United States District Judge Benjamin F. Gibson issued an order approving the Magistrate's Report and Recommendation dismissing the Petition for Writ of Habeas Corpus.

On May 20, 1988, the United States Court of Appeals affirmed based upon the opinion of the District Court. Petitioner now seeks this court to grant certiorari.

REASONS FOR DENYING THE WRIT

I.

THE TRIAL COURT DID NOT ERR IN NOT GIVING INSTRUCTIONS REGARDING CRIMES OF MANSLAUGHTER AND SECOND DEGREE MURDER.

In O'Guin v Foltz, 715 F2d 397, 399 (1973), the Sixth Circuit noted that unless there is an evidentiary support for the lesser included offense instruction, there can be no violation of due process from the refusal to give it. In this case, Petitioner's trial counsel requested an instruction on manslaughter. However, as the magistrate noted in his report and recommendation, the facts simply do not support an instruction on manslaughter. There was no request for an instruction on second degree murder. In fact, Petitioner's trial counsel specifically

indicated that he felt an instruction for second degree murder would be improper. (TT 606-607).

Petitioner's sole defense was non-participation. The undisputed testimony was clear that the killing had taken place during the commission of a robbery. Even the testimony relied upon by Petitioner in the Sixth Circuit supports this contention. Petitioner's claim in his supplemental brief is that he did not mean to shoot the victim. However, at the time of Petitioner's trial, the only relevant intent was the intent to commit the underlying felony.

In his Sixth Circuit brief Petitioner claimed that at the time of his trial in November, 1974, second degree murder was a

lesser included offense of first degree murder. Petitioner relies upon People v Carter, 387 Mich 397; 197 NW2d 57 (1972). Respondent contends that this is factually inaccurate. It was not until the Michigan Supreme Court's decision in People v Carter, 395 Mich 434; 236 NW2d 500 (1975), that the Michigan Supreme Court indicated that second degree murder was a lesser included offense to first degree murder.

In 1975, after Petitioner's trial, the Michigan Supreme Court issued a series of opinions dealing with the issue as to when the failure of the trial court to instruct on lesser included offenses would be deemed reversible error. In People v Henry, 395 Mich 367; 236 NW2d 489 (1975), the Michigan Supreme Court noted that the goal toward which the court was striving

was to formulate a court rule which would require instructions on lesser included offenses in every appropriate case without request from counsel. (395 Mich at 374). In noting that this goal had not yet been reached the court stated that:

> "We hold that with the sole acceptance of first degree murder cases, failure of the trial court to instruct on lesser included offenses will not be regarded as reversible error, absent requests for such instructions before the jury retires to consider its verdict."
> 395 Mich at 374.

In People v Carter, 395 Mich 434; 236 NW2d 500 (1975), the Michigan Supreme Court held that second degree murder is a lesser included offense of first degree murder. On that same day the Michigan Supreme Court issued its opinion in People v Jenkins, 395 Mich 440; 236 NW2d 503

(1975), in which it held that in every first degree murder case, the trial court was required to instruct sua sponte on the lesser included offense of second degree murder. The court in Jenkins specifically held that the decision was only to apply to cases tried after January 1, 1976. (Respondent again notes that Petitioner's trial was in November, 1974).

Finally, in People v Paul, 395 Mich 444; 236 NW2d 486 (1975), the Michigan Supreme Court stated that:

> "'Manslaughter' is a lesser included offense of first degree murder as well, and if evidence is adduced at trial to support conviction of manslaughter, that charge should be considered."
> 395 Mich at 444.

Respondent again notes that the court in People v West, 408 Mich 332; 291 NW2d

48 (1980), clarified this point by stating that:

> "Voluntary manslaughter is not a necessarily included lesser offense of first degree murder. It may be a lesser included offense, however, if evidence presented at trial would have supported a verdict of guilty of voluntary manslaughter." (Emphasis added.)
> People v West, supra, at page 343.

The Michigan Supreme Court therefore has drawn a distinction between necessarily included offenses and "cognate" lesser offenses. The standards regarding what is necessary to support each is distinct. In People v Ora Jones, 395 Mich 379; 236 NW2d 46 (1975), the Michigan Supreme Court stated that:

> "If the lesser included offense is one that is necessarily included within the greater, the evidence will always support the lesser if it supports the greater. In the area of 'cognate' lesser offenses, the evidence in each case adduced at the particular trial

> must be examined to determine whether that evidence would support a conviction of the lesser offense." People v Ora Jones, at page 390.

Inasmuch as manslaughter is not a necessarily included offense of first degree murder, the evidence adduced at a petitioner's trial must be examined to determine whether that evidence would support a conviction of the lesser offense. Respondent respectfully contends that the evidence adduced at Petitioner's trial would not support conviction for manslaughter. As noted above, even the testimony cited by Petitioner in his supplemental brief in the Sixth Circuit indicates that the killing took place during the commission of a robbery. There is no indication that the killing was done under some great provocation before

Petitioner's passions had subsided. Under MCL 750.329 it states as follows:

> "Any person who shall wound, maim or injure any other person by the discharge of any firearm, pointed or aimed, intentionally but without malice, at any such person, shall, if death ensue from such wounding, maiming or injury, be deemed guilty of the crime of manslaughter."

It is clear under Michigan law that malice is not required to prove manslaughter. An intent to kill or an intent to do serious bodily harm to the deceased is required. [See People v Doss, 406 Mich 90; 276 NW2d 9 (1979) and People v Springer, 100 Mich App 418; 298 NW2d 750 (1980)]. Although voluntary manslaughter is an intentional killing of another, felony murder does not require the intent to kill.

In the instant case Petitioner did not ask for an instruction on second degree murder. Co-defendant Deitrich (who was tried approximately a year before Petitioner) did request an instruction on second degree murder. In its opinion of November 27, 1978, the Michigan Court of Appeals in People v Deitrich, 87 Mich App 116, 135; 274 NW2d 472 (1978), clearly recognizes the retroactivity of the 1975 Carter case to Deitrich. Inasmuch as Deitrich had in fact requested a second degree murder instruction, the court held that he had preserved the issue. This is not the case with respect to Cole who did not request a second degree murder instruction.

Petitioner also challenges the failure of the court to give an instruction on

manslaughter. As the magistrate notes in his report and recommendation, voluntary manslaughter is not a necessarily included offense in first degree murder. Citing People v West, supra, at p. 343. As the Michigan Supreme Court states in West manslaughter may be a lesser included offense if the evidence presented at trial would have supported a verdict of guilty of voluntary manslaughter. Citing People v VanWyck, 402 Mich 266; 262 NW2d 638 (1978). The rules regarding instructions on lesser included offenses are, of course, a matter of state law. In Pilon v Bordenkircher, 593 F2d 264 (CA 6, 1974) vacated and remanded on other grounds, 441 US 1 (1979), the Sixth Circuit Court held that unless "there is [evidentiary] support for the lesser included offense

instruction, there can be no violation of due process from refusal to give it". (593 F2d at 267). See also Keeble v United States, 412 US 205, 213; 93 S Ct 1993; 36 L Ed 2d 844 (1973).

In O'Guin, supra, the Sixth Circuit, citing Pilon, supra, held that if it assumes support for a manslaughter instruction, the failure to so instruct the jury was erroneous. The question is then whether such an error rendered the trial so fundamentally unfair as to deny the defendant due process of law. Citing Henderson v Kibbe, 431 US 145 (1977); Long v Smith, 663 F2d 18 (CA 6, 1981), cert den, 455 US 1024 (1982).

As in the O'Guin case, at the time of Petitioner's trial the element necessary

to sustain a first degree felony murder conviction was the intent to rob. The intent to rob was never disputed. Petitioner's defense was non-participation. Even Petitioner's more recent arguments do not challenge the intent to commit the underlying felony, but rather the intent to kill.

II.

PETITIONER IS NOT ENTITLED TO RELIEF PURSUANT TO BRADY v MARYLAND, 373 US 83 (1963).

Petitioner argues that he is entitled to relief under Brady, supra, because of the prosecution's failure to disclose that certain witnesses would be paid an award if he was convicted. Petitioner claims that the prosecutor knew of these awards, was aware that this information was unavailable to Petitioner's trial counsel, and that the prosecution improperly failed to disclose this information to Petitioner's counsel.

As noted by the magistrate in the United States District Court in his report and recommendation, the offer of a reward is not the type of "exculpatory evidence"

contemplated by Brady, supra. Citing United States v Washington, 550 F2d 320, 330 (CA 5, 1977). The Magistrate properly noted that reward offers do not directly exculpate a defendant and that the rewards in the instant case were offered publicly. Thus, the information in question was equally available to the prosecutor and Petitioner's counsel.

Finally, in the instant case, the trial court held an evidentiary hearing on this issue and specifically concluded that there was no evidence that the state's court witnesses had been influenced by reward offers (Transcript of Evidentiary Hearing, March 10, 1978, pp. 33-36). Such a factual determination by the trial court is presumed to be correct. 28 USC § 2254(d). Petitioner has failed to overcome this presumption.

CONCLUSION

In conclusion, Respondent suggests that Petitioner has failed to state special and important reasons for the granting of the writ as required by Rule 17 of this Court. Respondent specifically notes that the decision of the Sixth Circuit in the instant case does not conflict with another federal court of appeals, nor has the Sixth Circuit ruled upon an important issue of federal law which has not been settled by this Court. Respondent, therefore, suggests that none of the considerations which might be the basis for granting a writ exist in the instant case.

RELIEF

WHEREFORE, in view of the foregoing, Respondent respectfully prays that this Honorable Court deny the instant Petition for Writ of Certiorari.

Respectfully submitted,

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